S. HRG. 108–80

LAND EXCHANGE IN IDAHO; BUILDING AND LAND CONVEYANCE IN SANDPOINT, ID; WASHOE INDIAN TRIBE TRUST; AMEND FEDERAL LAND POLICY AND MANAGEMENT ACT; AND LAND EXCHANGE IN COCONINO AND TONTO NATIONAL FORESTS

HEARING

BEFORE THE

SUBCOMMITTEE ON PUBLIC LANDS AND FORESTS

OF THE

COMMITTEE ON
ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

ON

S. 434
S. 435
S. 490

H.R. 622
H.R. 762

JUNE 12, 2003

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CONTENTS

STATEMENTS

	Page
Craig, Hon. Larry E., U.S. Senator from Idaho	1
Ferguson, Jerrell, Diamond Point Summer Homes Association	9
Kyl, Hon. Jon, U.S. Senator from Arizona	9
Reid, Hon. Harry, U.S. Senator from Nevada	8
Thompson, Tom, Deputy Chief, National Forest Systems, Department of Agriculture	2
Thomas, Hon. Craig, U.S. Senator from Wyoming	10

APPENDIXES

APPENDIX I

Responses to additional questions 13

APPENDIX II

Additional material submitted for the record 15

LAND EXCHANGE IN IDAHO; BUILDING AND LAND CONVEYANCE IN SANDPOINT, ID; WASHOE INDIAN TRIBE TRUST; AMEND FEDERAL LAND POLICY AND MANAGEMENT ACT; AND LAND EXCHANGE IN COCONINO AND TONTO NATIONAL FORESTS

THURSDAY, JUNE 12, 2003

U.S. SENATE,
SUBCOMMITTEE ON PUBLIC LANDS AND FORESTS,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:44 p.m. in room SD–366, Dirksen Senate Office Building, Hon. Larry E. Craig presiding.

OPENING STATEMENT OF HON. LARRY E. CRAIG, U.S. SENATOR FROM IDAHO

Senator CRAIG. Good afternoon, everyone. The Subcommittee on Public Lands and Forests of the full Energy and Natural Resources Committee of the U.S. Senate will be convened. I apologize for running a little late. The floor called a vote on us right at 2:30, so our timing has slipped a little bit. But anyway, again thank you all for being here.

I do not know whether my ranking member, Senator Wyden, will be able to attend. I saw him in the hall and he said: "Do you need me?" It sounded like he had another schedule that had him committed.

But anyway, I want to welcome the Deputy Chief of the National Forest Service, Tom Thompson, who is here to testify on behalf of both the Forest Service and the Bureau of Land Management on five bills that we will consider today. I believe these bills will be noncontroversial. Thus, I hope to move through the hearing with an unusual thing here in the Senate, deliberate speed.

I have two Idaho proposals that we will consider today. The first is S. 434, the Idaho Panhandle National Forest Improvement Act for 2003. It is an opportunity to provide land for local benefits and to meet the facility needs of the Forest Service in the Silver Valley of Idaho. This bill will offer for sale or exchange administrative parcels of land in the Idaho Panhandle National Forest that the Forest Service has identified as no longer in the interests of public ownership and that disposing of them will serve the public interest.

The proceeds from these sales will be used to improve or replace the Forest Service ranger station in Idaho's Silver Valley.

The second is S. 435, the Sandpoint Land and Facilities Act of 2003. It is a unique opportunity to meet the facility needs of the Forest Service in Sandpoint, Idaho, and to provide facilities for local county government. This bill will transfer ownership of the local General Services Administration building, which is currently housing the Forest Service, to that agency. The bill also provides authority for the Forest Service to work with Bonner County, Idaho, in exchange of existing buildings to Bonner County in exchange for a new and more functional building for the Forest Service.

This transfer of ownership will not only provide the opportunity for the local Forest Service office to obtain a facility that best meets their needs, but also will meet the facility needs of Bonner County.

Both of these bills are a win-win situation for the Forest Service and the community and are outstanding examples of the Federal Government at the local level working with the communities to create common sense solutions that result in more efficient operations and better service to the public.

As with our last hearing, we are considering a number of bills that were passed by the U.S. House of Representatives or the Senate in the 107th session of Congress. H.R. 762 is Congresswoman Barbara Cubin's bill to amend the Federal Land Policy and Management Act of 1976 and the Mineral Leasing Act dealing with leasing right of ways, and H.R. 622, Congressman Renzi's proposal to exchange certain lands in the Coconino and Tonto National Forests in Arizona, have been through the House process twice, so we will try not to put them through that again.

Likewise, S. 490, Senator Reid and Senator Ensign's bill to direct the Secretary of Agriculture to convey certain lands in the Lake Tahoe Basin Management Unit Nevada to the Secretary of the Interior, to be held in trust for the Washoe Indian Tribe of Nevada and California. This bill was passed by both bodies in the last session.

We know of no major concerns with any of these five bills. With that and no other Senators attending at this time, we will recognize our Deputy Chief for testimony on these pieces of legislation. Tom, welcome to the committee.

STATEMENT OF TOM THOMPSON, DEPUTY CHIEF, NATIONAL FOREST SYSTEMS, DEPARTMENT OF AGRICULTURE

Mr. THOMPSON. Thank you. Mr. Chairman, thank you for this opportunity to appear before you this afternoon. I am Tom Thompson, Deputy Chief of the National Forest System. I am here to provide the Department's comments on these five bills. The Department supports S. 434 and H.R. 622. The Department does not oppose H.R. 762 with some changes. The Department has some concerns with S. 490 and would like to work with the committee to address those concerns.

Let me start with H.R. 622, the Tonto and Coconino National Forests Land Exchange Act. H.R. 622 directs the Secretary to exchange 108 acres of National Forest System land within the Tonto National Forest northeast of Payson, Arizona, and currently occu-

pied by 45 residential cabins under special use permits. We would exchange that for 495 acres of non-Federal land known as the Q Ranch within the Tonto National Forest east of Young, Arizona. This exchange is identified in the bill as "Diamond Point-Q Ranch Land Exchange."

The bill also directs the Secretary to exchange approximately 222 acres of National Forest System land within the Tonto adjacent to the town of Payson near the municipal airport for 157 acres of private land owned by the Montezuma Castle Land Exchange Joint Venture which is adjacent to the Montezuma Castle National Monument and nearly 108 acres of private land known as the Double Cabin Parklands. Both of these private parcels are within the Coconino National Forest boundary.

H.R. 622 requires that the values of the non-Federal and Federal lands be exchanged on equal or equalized, as determined by the Secretary through our appraisal by a qualified appraiser and performed in conformance with the uniform standards for Federal land acquisitions and the Federal Land Policy and Management Act of 1976.

The bill requires that the Secretary execute the Montezuma Castle and Diamond Point land exchanges within six months after receipt of an offer from the private landowners unless the Secretary and private landowners mutually agree to extend such deadline.

The Department supports the concept of exchanging National Forest System lands which were identified in H.R. 622. However, we would like to work with the committee to clarify and make sure that the priorities for deleting the Federal properties from exchange—to ensure that the priorities that we have are the ones that should be there, so that if potential parcels are not exchanged, that we have manageable ownership boundaries after the exchange is completed.

Let me move to H.R. 762, which provides for continued predictability and inter-agency consistency and efficiency in determining rental fees for linear rights of way uses authorized by the Forest Service and the Bureau of Land Management on Federal lands which they administer. It would apply to right of ways authorizations for linear facilities, including oil and gas pipelines, electric transmission lines, telephone, fiber optic communication lines, water lines, and roads.

The Mineral Leasing Act of 1920 as amended and the Federal Land Policy and Management Act of 1976 as amended direct that the holder of a permit of the right of way pay fair or market value of the right of way use to the United States, as determined by the appropriate Secretary who grants or issues the right of way. The Secretary's discretion to determine the manner in which the market value is established has often been the subject of dispute and contention. In an April 11, 2002, hearing on the House Resources Committee on National Parks, Recreation, and Public Lands on a previous version of the bill, Peter Culp, the Assistant Director for the Bureau of Land Management, testified that the Department of the Interior was committed to ensuring that these right of way rental fees for the use of Federal land managed by the BLM are appropriate and fair and that rates for such rental fees were predictable and certain.

He further testified that the current land-based fee rates for linear right of way facilities can continue to be an appropriate basis for derivation of right of way rental fee, with periodic adjustments for inflation.

H.R. 762 as presently written would give the Secretaries one year after the date of its enactment to make such changes through administrative procedures needed to revise the regulations and the agency policy. Based on our experience with such procedures, we would recommend that we would be provided at least 2 years following the date of enactment for the respective Secretaries to complete those regulatory and policy changes.

The Department of Justice has also advised us of its concern with the characterization of the fee schedule as "fair market rental value" in the heading of section 2 and "fair market value" in new paragraph K, and recommends that these descriptions be changed. "Fair market value" and "rental value" are terms of art within both the appraisal profession and case law and the bill should not confuse the two terms. Any market value determination of value requires an analysis of what is happening in the marketplace as opposed to establishment of a fee schedule as provided in H.R. 762.

While H.R. 762 is generally consistent with our agency's current plans to update our linear fee schedules, it would constrain future agency options in a way that may be undesirable. For example, there may be limited cases where a site-specific evaluation may be more appropriate than the use of a fee schedule.

However, we recognize the passage of this bill would provide greater stability and reduce the amount of uncertainty felt by permit holders, while generally providing a reasonable rental fee for these linear uses of the Federal lands. Therefore, with the adoption of the earlier recommendations, we would not oppose enactment of this bill.

Let me move to S. 434, which is the Idaho Panhandle Forest Improvement Act of 2003, which authorizes the Secretary of Agriculture to sell or exchange all or parts of certain tracts of National Forest System land in the State of Idaho and to use the proceeds for acquisition of land and construction of a new ranger station in the Silver Valley portion of Idaho Panhandle National Forest.

To the extent that excess proceeds after construction of the ranger district, the bill would allow the proceeds to be used to acquire land, construct or rehabilitate other facilities on the Idaho Panhandle.

The Department supports S. 432 because the tracts identified for sale or exchange are no longer needed for Forest Service administrative purposes and the conveyances of these tracts would reduce long-term costs of administering related special use permits. Additionally, the construction of a new ranger station in Silver Valley would certainly enhance public service and improve public safety.

As S. 434 illustrates, the Department has a number of facilities and opportunities to be rid of land that is excess to the agency needs. The fiscal year 2004 budget contains a proposal for establishment of a Federal Acquisition and Enhancement Fund that would enable the Secretary to sell such units excess to the agency's need and utilize proceeds from those sales for acquisition or development of land and improvements for administrative purposes.

Funds collected under this authority would address backlogs and administrative consolidations while improving efficiencies through the reconstruction of functionally obsolete facilities or construction of new facilities. To this end, the Department will submit proposed legislation concerning this fund in the upcoming weeks.

Let me move to S. 435, Sandpoint Land and Facilities Conveyance of 2003. S. 435 directs the Administrator of the General Services Administration to transfer to the Secretary of Agriculture without reimbursement administrative jurisdiction over the Sandpoint Federal Building and 3.17 acres of land in Sandpoint, Idaho. The bill requires the Secretary to assume the obligation of the Administrator to repay the Federal Finance Bank the debt incurred with respect to the property.

S. 435 authorizes the Secretary to sell or exchange all right, title, and interest of the Forest Service in and to the property for market value, and exchange consideration may, if elected by the Secretary, include the construction of administrative facilities for the National Forest System in Bonner County.

The bill requires the entity acquiring the property honor all outstanding indebtedness on the property to the Federal Finance Bank. Further, the Secretary can use proceeds from the sale of the property only for the acquisition, construction, or improvement of administrative facilities and associated land, the acquisition of lands and interests in land for additional National Forest System land in the northern region of the Forest Service in Idaho.

The Forest Service has leased this facility from the General Services Administration, the Sandpoint Federal Building, for almost 30 years. The building is too large for the combined Federal presence and steps should be taken to address this problem.

Moving to S. 490, the Washoe Tribe Land Conveyance, S. 490 directs the Secretary of Agriculture to convey 24.3 acres of National Forest System land within the Lake Tahoe Basin Management Unit to the Secretary of the Interior, to be held in trust for the Washoe Indian Tribe of Nevada and California. The conveyance would be subject to a reservation of a non-exclusive easement on the forest road to continue public and administrative access to other National Forest System land. In addition, the bill would grant vehicular access over a forest road to the parcel by tribal members under certain circumstances.

The transfer would occur without consideration. The Department believes the bill would defeat public expectations of continued access to this lakefront parcel. The Department has concerns with S. 490 and would like to work with the committee on alternatives that would meet tribal needs, as discussed in our testimony. The Department understands and appreciates fully the goals of the Washoe Tribe to acquire land in Lake Tahoe Basin for the purpose of exercising recurring exclusive use of the Lake Tahoe shorefront property for traditional and cultural customary purposes.

The Forest Service has taken extensive actions to meet the needs of the tribe within the limits of authority. At present the Washoe Tribe holds a special use permit with the Forest Service for uses described in section 1(b)(2). These uses have been analyzed and approved through the Forest Service special use permitting process and appear to meet the needs of the tribe.

The 24.3 acre parcel identified in S. 490 for transfer to the Department of the Interior was originally acquired by the Forest Service as a part of a large purchase using funds authorized with the Land and Water Conservation Fund to provide public access to recreational resources on Lake Tahoe Basin.

Transfer of this parcel to the Department of the Interior to be held in trust for exclusive use by the Washoe Tribe is not consistent with the public purposes for which the land was purchased. The Lake Tahoe Basin Management Unit has placed a high priority on acquisition and retention of lakefront property for public access and watershed protection. Any land conveyance should be with consideration to ensure public obtains market value. The Department also has concerns with the reversionary interest identified in section 1(e)(2).

In lieu of transferring the parcel to the Secretary of the Interior, the Department recommends the bill be amended to authorize the Secretary of Agriculture, upon the tribe's request, to close the parcel to general public use on a temporary basis to protect the privacy of traditional and customary uses, cultural uses, of the land by the tribe.

We note that the Congress has provided similar statutory authority to the Secretary of the Interior in section 705(a) of the California Desert Protection Act and section 50(c) of Public Law 100-225, and to the Secretary of Agriculture under section 2(d)(1) of Public Law U.S.C. 460(d)(1), an act that established that Jemez National Recreational Area.

Additionally, to meet the tribe's goal of using the parcel for cultural, horticultural, and ethnobotany purposes, the provision could be added to the bill to authorize the Secretary of Agriculture to ensure—or issue a permit to the Washoe Tribe for these purposes. The Department believes that this approach would accommodate both the goals of the Washoe Tribe and the objective of maintaining public access to the parcel.

This concludes my statement. I would be happy to answer any questions.

Senator CRAIG. Well, Tom, thank you very much. I have several questions here, none of them in great length, but I think points of clarification as we move to final action on these pieces.

In S. 435, it has been my impression that the Forest Service strongly supports this legislation. Is that true?

Mr. THOMPSON. We believe that the transfer would certainly be beneficial.

Senator CRAIG. That is as good as it gets?

Mr. THOMPSON. That is where we have been as far—the transfer would certainly be beneficial to the forest.

Senator CRAIG. Fine enough. We will take it at that.

In S. 490, I note that you now have a number of concerns. In November 2001, Ms. Kimball, then Acting Associate Deputy Chief, testified on S. 691—that is the same version in the 107th—that, and I quote, "The administration has not completed its review of S. 691. We plan to conduct a more thorough review of the language over the next few weeks, to consult with the Department of the Interior and explore additional options. Once that review is com-

pleted, we would like to work with the committee and the bill's sponsors to resolve concerns that our review might identify."

On June 28, 2002, 6 months later, we marked up S. 691 and favorably reported the bill out of the committee.

Given the plans for the agency "to work with the committee and the sponsors to resolve concerns that our review might identify," could you provide my staff with documentation of when and who your staff communicated with regarding your review? I need to know when you discussed your concerns with the sponsors and when you discussed your concerns with the Energy Committee staff. Can you have the documentation to the staff by next Tuesday?

Mr. THOMPSON. I certainly think we could provide that information. I have not got it with me, obviously.

Senator CRAIG. Okay, that would be appreciated.

On S. 762, the rights of way bill, why does it take so long, 2 years? Is it a staffing problem? If so, how can we help you?

Mr. THOMPSON. As I understand it, the biggest problem is doing the market analysis and doing it with—the scope and the scale of that, the time that it is going to take. That in itself is going to use perhaps as much as a year. Then you have got the regulations, the public comment, the evaluation, and that would take it through a good chunk of that second year.

The market analysis is the big time-consumer.

Senator CRAIG. How many miles of rights of way are we talking about here?

Mr. THOMPSON. Well, for the Forest Service, we have I think 20,000 of these types of right of ways.

Senator CRAIG. Total.

Mr. THOMPSON. Total, 20,000.

Senator CRAIG. But in this instance?

Mr. THOMPSON. Of that, there is about 105,000 miles.

Senator CRAIG. Total.

Mr. THOMPSON. Total. So it is not a small task. And of course, looking at it across the entire United States, a lot of different country, a lot of different analysis to do.

Senator CRAIG. Well, that is a daunting task. I do not disagree with that. At the same time, oftentimes a failure to perform when we know it is going to happen holds in abeyance some tremendous economic activity out there as it relates to the investment and people waiting under the general assumption that these kinds of things are relatively routine once certain priorities and values are established.

On S. 622, I note in your testimony that you have concern about the priorities of deleting Federal properties from the exchange to ensure that a manageable land ownership pattern remains. I also understand that the language in the bill on the priorities for deleting Federal properties was agreed to by the Forest Service who was in place when the legislation was developed and passed in the House in the last session.

Can you help me understand what has changed between last year and this year regarding the issue, because it is my understanding you wrote the language.

Mr. THOMPSON. I think, as I said, I think we just need to work to make sure that we have the right order. I think there is a little confusion as to whether it is or it is not, and it is going to take a very little bit of time to straighten that out. If we have the right order in there right now, we are very comfortable with it. If it is out of order, I think it would be good to make sure that it is right, and that is all that we are saying.

Senator CRAIG. This is a message to be conveyed by you, not specifically a question of you, Tom. On May 7, I sent a letter to Chief Bosworth regarding an issue related to phosphate mining leaseholders in southeastern Idaho. My office has been inquiring on a weekly basis as to when I will receive response to the letter. The issue is one of some time-sensitiveness for the leaseholder involved, and I ask you to inquire into the matter, if you would, as to when we might be able to get a response to it.

Mr. THOMPSON. I can assure you that I will.

Senator CRAIG. And oh, by the way, I have a copy of it if you are interested. Both Congressman Mike Simpson—it is in his district—and I are concerned about this, and if we can get an answer sooner rather than later, it would be greatly appreciated.

Mr. THOMPSON. We will provide you an answer as to when we can get it by tomorrow and certainly expedite everything we can to get a reply.

Senator CRAIG. Super.

Senator Bingaman will be submitting questions for the record. Also, for-the-record statements by Senator Harry Reid, Senator John Kyl, and Senator Craig Thomas will become a part of the record.

[The prepared statements of Senators Reid, Kyl, and Thomas follow:]

PREPARED STATEMENT OF HON. HARRY REID, U.S. SENATOR FROM NEVADA

Mr. Chairman, I want to thank you and the committee for holding this important hearing today on the conveyance of 24.3 acres within the Lake Tahoe Basin north of Skunk Harbor, Nevada, to the Washoe Tribe of Nevada and California. This is not an expansive tract of land, but it is of profound significance to the Washoe people. This bill is supported and cosponsored by Senator Ensign.

In 1997, a diverse group of federal, state, and local government leaders gathered at the Lake Tahoe Presidential Forum to consider the challenges facing the extraordinary natural, recreational, and ecological resources of the Lake Tahoe region and to discuss the future of the Lake Tahoe basin. During that Forum, the participants made a commitment to support the traditional and customary uses of the Lake Tahoe basin by the Washoe Tribe—most importantly, to provide the Tribe access to the shore of Lake Tahoe for cultural purposes. Lake Tahoe has not only been a part of the civilization and culture of the Washoe Tribe, it is fundamental to who the Washoe are as a people.

The ancestral homeland of the Washoe Tribe of Nevada and California included an area of over 5,000 square miles in and around the Lake Tahoe Basin. My bill conveys a small tract of land from the Lake Tahoe Basin Management Unit of the U.S. Forest Service to the Secretary of the Interior to be held in trust for the Tribe. The bill ensures that members of the Tribe will have the opportunity to engage in their traditional and customary cultural practices at the Lake in the future as they have done in the past. This will help the tribe meet the needs of spiritual renewal and general reunification of the Tribe with its aboriginal lands—forever. The conveyance will promote the Tribe's efforts in land and environmental stewardship in partnership with local, state, and federal agencies to preserve and protect the resources of the Lake for all generations.

Mr. Chairman, the purpose of the bill is clear: the conveyed land will be available only for non-commercial tribal purposes. I would like to explain the history behind the bill's "no development" clause. This provision was added at the request of the

Washoe Tribe to guarantee that this land remains in its present unspoiled state for traditional and customary cultural uses. Tribal elders have indicated to me that these purposes could not be accomplished if the land were commercially developed, so I am pleased to include a provision ensuring that this land will remain in its natural state. It serves as a testimonial to the tribe's integrity and to how important the return of this land is to the Washoe people, and ensures that the conveyance will be consistent with our ongoing efforts to save Lake Tahoe. The collective wisdom of the Tribe represents a gold mine of historical knowledge and natural understanding of the processes at work within the basin, and their help is essential to achieving the goal of saving Lake Tahoe. Indeed, one of the most compelling reasons to support this bill is that the Washoe Tribe serves as such a powerful advocate for the Lake.

Mr. Chairman, this is not a controversial bill. It passed the Senate unanimously in 2000 and 2002, and passed the House with unrelated amendments, but the two versions of the bill were not reconciled and neither version became law. It is a good bill, and it is the right thing to do. I hope that the third Congress is a charm and that we make good on our important promise to the Washoe Tribe.

PREPARED STATEMENT OF HON. JON KYL, U.S. SENATOR FROM ARIZONA

Mr. Chairman, H.R. 622, "To provide for the exchange of certain lands in the Coconino and Tonto National Forests in Arizona, and for other purposes," directs that two land exchanges take place in the Tonto and Coconino National Forests in Arizona: the Montezuma Castle/Payson Airport Land Exchange and the Diamond Point Land Exchange.

The legislation authorizes the Forest Service to enter into equal-value land swaps to acquire a 157-acre parcel of private land to enhance and protect the Montezuma Castle National Monument, as well as a 143-acre open meadow wildlife habitat known as Double Cabin Park. Both parcels are in the Coconino National Forest.

In exchange, approximately 221 acres of national forest property adjoining the Town of Payson municipal airport would be acquired.

The legislation also authorizes the Forest Service to acquire a 495-acre parcel known as the Q Ranch, which is currently owned by The Conservation Fund. In exchange, the Diamond Point Summer Homes Association will acquire 108 acres of federal land that has been occupied by the association's 45 residential cabins since the 1950's.

The Tonto National Forest Plan specifically recommends conveyance of the federal land.

This is common sense legislation that accomplishes goals that the Forest Service has stated are a priority. The administrative process has been very protracted, but the result is a plan that all parties see as beneficial. I therefore look forward to this committee's hearing on H.R. 622, and I ask that the statement of Jerrell Ferguson, a member of the Diamond Point Summer Homes Association, be inserted in the record at this point.

STATEMENT OF JERRELL FERGUSON, DIAMOND POINT SUMMER HOMES ASSOCIATION

Mr. Chairman and Members of the Subcommittee: Thank you for the opportunity to testify today. My name is Jerrell ("Jim") Ferguson, and I am a member of the Diamond Point Summer Homes Association. Our association has 45 residential cabins currently permitted on federal land within the Tonto National Forest east of Payson, Arizona.

DIAMOND POINT LAND EXCHANGE

Over forty years ago, under a program to encourage public use of the nation's forests, the U.S. Forest Service permitted our members to build cabins on a parcel of National Forest land located near Diamond Point. Like other similar "recreation residences", the 108-acre parcel has no public access and is managed as if in private ownership, with a number of roads, driveways, water systems, and other improvements associated with the residences.

The Federal land was identified for disposal in the 1985 Tonto National Forest Plan. We began discussing a land exchange with the Forest Service in 1999. In November 2000, we proposed an exchange of the 495-acre Q Ranch parcel for the Federal land underlying our members' cabins. Because the Q Ranch acquisition was of such significant public interest, and because the owner of the Ranch had listed it for sale on the private market, The Conservation Fund, a national leader in land protection, agreed to purchase the property and option it to the Association for use

in the land exchange. The Forest Service confirmed that the Q Ranch was a very high priority for Federal acquisition and encouraged us to proceed with the exchange proposal.

Since that time, we have paid for a land survey and a cultural resources inventory of the Federal property. The Conservation Fund spent over $2 million dollars of their limited resources on the Q Ranch, anticipating the exchange would have been completed by now, and thereby releasing their funds for further land protection work. We have had numerous meetings with Forest Service representatives at all levels and while their vocal support for the transaction remains strong, almost no progress has been made in advancing the process. In fact, as alluded to by Congressman Hayworth, in the seventeen months since our first formal proposal to the Forest Service, four of our members have died. Yet, the agency has still not executed the non-binding Agreement to Initiate the exchange process.

The Federal land proposed for conveyance to the private sector is already treated like private land and was specifically identified in the Forest Plan for disposal. The Q Ranch acquisition represents the third and final transaction necessary for the United States to acquire a major inholding in the Tonto National Forest. The exchange proposal has enjoyed broad support and literally no opposition. This exchange is so clearly in the public interest, it is difficult to explain why the Forest Service has been incapable of moving it forward under the administrative process.

MONTEZUMA CASTLE LAND EXCHANGE

Although I do not represent the private proponents of the Montezuma Castle Land Exchange, I am prepared to speak on their behalf. Since the mid-1990's, they have been frustrated in their efforts to complete a straight-forward exchange with the Forest Service.

This land exchange was originally proposed to the Forest Service in May 1994 and included a number of parcels of non-Federal land in exchange Federal land within and around the Town of Payson. The Forest Service had encouraged the acquisition of the private lands for the exchange, including the Montezuma Castle and Double Cabin Park parcels. However, the agency never authorized the documents required to initiate an administrative exchange. The local landowners endured years of frustration, and significant investment in cultural resources surveys, valuation work and NEPA studies.

With the January 2000 encouragement of the former Tonto National Forest Supervisor and the Town of Payson, the participants spent additional funds to restructure and reduce the size of the exchange proposal. However, with a change in Forest Supervisors, the agency then abandoned the exchange, and the local investors were left holding millions of dollars worth of land that the Forest Service had encouraged them to purchase. The current Montezuma Castle Land Exchange proposal involves approximately 222 acres of Federal land needed for commercial and residential development within the Town of Payson.

The land at Montezuma Castle is critical to the Monument's views shed, and includes important riparian habitat along Beaver Creek. The land at Double Cabin Park includes a vast high meadow and wetlands that provide important wildlife habitat. Congressman Hayworth's legislation authorizes the Forest Service to transfer all or a portion of the Montezuma Castle parcel to the National Park Service if deemed appropriate by the Secretaries of the Interior and Agriculture. The exchange is supported by the Town of Payson, the Gila County Board of Supervisors, the Payson Regional Economic Development Group, the Rim Country Regional Chamber of Commerce, and the National Park Service.

Mr. Chairman, that concludes my testimony, with one exception. I want to once again personally thank Congressman Hayworth and you for holding this hearing and hopefully passing legislation that will ensure that highly desirable lands are secured for the public, while the interests of private individuals and the Town of Payson are served.

PREPARED STATEMENT OF HON. CRAIG THOMAS, U.S. SENATOR FROM WYOMING

Thank you, Mr. Chairman. I am here today to speak in support of H.R. 762, a bill introduced by my colleague from Wyoming, Congresswoman Barbara Cubin. H.R. 762 would amend the Federal Land Policy and Management Act of 1976 and the Minerals Leasing Act to clarify the method by which the Secretaries of the Interior and Agriculture determine the fair market value of certain rights-of-way granted, issued, or renewed, under these Acts.

Four years ago, the Bureau of Land Management and the U.S. Forest Service abandoned the traditional linear fee rent method, where rent is calculated based on

the area of the right-of-way times the market value of the land, and adopted a per line fee, sometimes referred to as fiberent, based on the value of the throughput. As a result, federal agencies charged a right-of-way fee for each strand of cable that went down the pipe. As you can imagine, this fee structure caused a great deal of concern because it had the potential to dramatically increase fees by as much as 1,500 percent, and thereby discouraged deployment of fiber optics to rural areas, like Wyoming, where the federal government owns a significant amount of land.

Through rulemaking, we have worked to address these problems, yet need to find a more permanent solution. H.R. 762 is that solution. This bill ensures that rights-of-way fees are reasonable and will help facilitate the deployment of critical infrastructure to areas that were adversely affected by the previous fee system. This bill creates a policy that protects the value of our federal lands, without altering current environmental protections, and at the same time helps to ensure that these federal lands continue to be available to a multitude of compatible uses.

This is a good bill, for Wyoming, and for other States in the West and I look forward to working with my colleagues in the Senate to pass H.R. 762. Again, thank you, Mr. Chairman, for holding this hearing. I look forward to hearing the Administration's views on this piece of legislation.

Senator CRAIG. With that, Tom, we thank you very much. We have tried to make this as painless as possible, and, while this is not necessarily a record hearing, in light of the scope and the magnitude of the legislation, it comes close time-wise.

Mr. THOMPSON. Thank you for this opportunity.

Senator CRAIG. Thank you very much. The subcommittee will stand adjourned.

[Whereupon, at 3:09 p.m., the hearing was adjourned.]

APPENDIXES

APPENDIX I

Responses to Additional Questions

[Answers to the following questions were not received at the time this hearing went to press.]

ANSWERS TO QUESTIONS FROM SENATOR BINGAMAN

S. 434—IDAHO PANHANDLE FOREST IMPROVEMENT ACT

Question 1. Section 3(a)(3) authorizes the Secretary to sell or exchange the Shoshone Work Camp. How many acres does this parcel include?

Question 2. What is the approximate value of the three parcels that the Secretary is authorized to convey in section 3(a)?

Question 3. Section 4(d) states that the Agriculture Property Management Regulations shall not apply to any actions taken pursuant to this Act. Why is this provision necessary?

S. 435—SANDPOINT LAND AND FACILITIES CONVEYANCE

Question 1. What is the value of the land, including the building, conveyed by this bill?

Question 2. Section 2(b) requires the Secretary to assume an obligation to repay debt. What is the amount of this obligation that the Secretary will be required to repay?

Question 3. Section 3(e) states that "Part 1955 of title 7, Code of Federal Regulations" shall not apply to any action carried out under this section. Why is this provision necessary?

H.R. 762—REASONABLE RIGHTS-OF-WAY FEES ACT

Question 1. Section 2(a) of the bill amends the Federal Land Policy and Management Act (FLPMA) to add a new section 504(k). That subsection provides, in part, that the Secretary of the Interior shall amend the pertinent regulations "to revise the per acre rental fee zone value schedule" to reflect current values of land in each zone. Don't the relevant regulations for the Department of the Interior and the Department of Agriculture already reflect the current values of land? If not, why not?

Question 2. Section 504(g) of FLPMA (43 U.S.C. 1764(g)) requires a holder of a right-of-way to pay the fair market value, as determined by the Secretary, for the use of the right-of-way. I understand that several previous studies have found that both the Department of the Interior and the Department of Agriculture have often failed to collect the full fair market value for rights-of-way. Will the linear right-of-way fee established in H.R. 762 likely result in a higher or lower fee than the current FLPMA standard? (I'm interested in comparing the two fee standards, not the amounts actually collected in the past).

Question 3. If your answer to question #2 is that the fee in H.R. 762 will likely result in lower fees than the fair market value standard, then why is it in the best interests of the United States government to charge a fee that is less than the fair market value of the right-of-way?

APPENDIX II

Additional Material Submitted for the Record

STATE OF WASHINGTON,
Olympia, WA, June 11, 2003.

Hon. LARRY E. CRAIG,
Chairman, Subcommittee on Public Lands and Forests, Senate Energy and Natural Resources Committee, Washington, DC.

Re: Hearing of June 12, 2003 on H.R. 762, the Reasonable Right-of-Way Fees Act

DEAR SENATOR LARRY CRAIG: As President of the Western States Land Commissioners Association, I would appreciate your adding to hearing record on H.R. 762 the concerns raised by the Western States Land Commissioners Association in the attached letter, when our members discussed the identical bill, H.R. 3258, at our conference last July. Our main concern is that of institutionalizing below-market rates, which affect both Federal and State revenues. We take as our point of reference the Federal Land Policy and Management Act (FLPMA) Sec. 102 (a)(9), which established a policy that "the United States receive fair market value of the use of public lands and their resources . . ."

In addition, as a Lands Commissioner, I would like you to consider crafting a system that provides the following conditions:

1. A common system for BLM and the Forest Service, which is currently the case.
2. Reviewing rates on an annual basis for areas that are known to have rapidly changing market values. Rates for others might be reviewed every 5 years at a minimum, based on spot checks and other economic indicators. The current base was set in 1986 with an escalator that has been roughly 1 to 2 percent per year since 1994 and has not exceeded 2.4 percent since that date. Spot checks could be done with appraisals, surveying county assessors and by using data purchased from key existing metropolitan real estate sales information systems.
3. Differentiating urban from rural base rates and escalators, rather than averaging rates on a county-wide basis. Retain the current linear rights-of-way provision that allows the agencies to use local values, if they are significantly greater than the average county values.
4. Using an intergovernmental, public-private committee of real estate professionals similar to that used to establish the system for BLM and Forest Service communications sites in November 1995 published in 43 CFR 2803.1-2. A representative professional group could determine whether a use or land surface value is more appropriate for each of the affected linear uses.
5. Checking rates against market values by calling for a GAO report 3 to 4 years after enactment and periodically, perhaps every 5 years, after that first report. An independent check is important to assure that base rates are revised at appropriate intervals. Market data in the Northwest showed that on a linear foot basis Forest Service fiber-optic rates in the late 1990's were less than one cent versus fifty cents to a dollar for comparables.

Thanks for your consideration.

Sincerely,

DOUG SUTHERLAND,
Washington State Commissioner of Public Lands.

STATEMENT OF THE TELECOMMUNICATIONS RIGHT-OF-WAY COALITION

TelROW's members, including companies and trade associations in the communications and energy sectors, operate a network of more than 100,000 miles of fiber-optic cable, and more than 700,000 miles of electric transmission lines, across the United States. Some of this critical infrastructure, especially in the west, crosses

federal public lands. The companies who formed this coalition were motivated by several interim and proposed policies developed by the Bureau of Land Management and U.S. Forest Service (see attachments).* We support H.R. 762 as a necessary amendment to the Federal Land Policy and Management Act (FLPMA), to ensure a reasonable approach to collecting right-of-way rents. H.R. 762 ensures that right-of-way rents are consistent with the fair value of the right to cross federal lands, thus promoting sound management of these public resources, and advancing the public's interest in these lands.

TelROW appreciates the opportunity to provide written testimony to the Subcommittee, as well as the efforts by the Subcommittee, the full Committee, and its leadership in working with the Bureau of Land Management and U.S. Forest Service to address concerns about the original regulatory proposals that identified the need for this legislation. While we believe that fee increases and changes in the right-of-way valuation methodology were ill advised, we appreciate the constructive efforts of the Bureau of Land Management and U.S. Forest Service, in reaching out to stakeholder and professional groups like the Appraisal Institute and TelROW, and in working with the House Resources Committee and Representative Barbara Cubin to refine earlier drafts of H.R. 762. We believe that passage of H.R. 762 will facilitate the resolution of what has been a long, difficult process, and a source of much uncertainty for federal land managers and those companies who deploy and manage critical network infrastructure. Passage of H.R. 762, as well as the continuation of efforts underway by federal land managers and agencies to streamline and simplify the establishment and management of linear rights-of-way, are important steps to protect and facilitate critical network infrastructure, including pipelines, powerlines, and communication facilities.

INTRODUCTION AND BACKGROUND

Communications providers and other operators and owners of linear infrastructure pay the federal government for the use of rights-of-way (ROW) over lands administered by the U.S. Forest Service (USFS), the Bureau of Land Management (BLM), and other federal agencies. Currently, the fees for rights-of-way on federal lands are based on a proxy for the market value of the land, the size of the right-of-way, and the number of cables, pipes, or other distinct facilities. These calculations are reasonably equivalent to the land value and the physical impact of the facility.

Recently, however the BLM and USFS proposed to increase ROW fees, by changing the basis of the calculation for "fiber-optic projects," based on data they believed demonstrated a special, separate "value of fiber-optic use and occupancy." These interim and proposed policies, however, capture neither the fair market value of the land over which fiber-optic cable is conveyed, nor the consequent impact on federal lands and resources. Instead, the proposed policies attempt to capture a portion of telecommunications revenues, by charging for uses not based on the value of land to the federal government or impacts thereto, but by rates specific to the technology or economic value of the facilities themselves. We believe these policies are based on arbitrary assumptions and anecdotal evidence regarding the "market" value of telecommunications easements across private, state, and municipal lands, sometimes in distant, urban settings. The first instances in which these proposed and interim policies were implemented resulted in fees 150 times those in the published, established, and legitimate federal fee schedules. The USFS and BLM have failed to justify such large increases based either on actual land value or on land impact. Currently, after much Congressional inquiry and stern oversight, the agencies have indefinitely delayed implementation of new fees.

THE PROPOSED METHODOLOGIES ARE UNJUST

The methodologies proposed by the BLM and USFS are inconsistent with current regulations and policies applied to other infrastructure providers. Forcing critical infrastructure providers to pay dramatically increased fees for the use of federal lands, particularly where the new use is similar or compatible to other existing uses, involving impacts identical to or less than uses for which a lower fee is charged, is inconsistent. Such policies protect neither the public land nor the public interest. Such policies do not accomplish the goals of protecting the value of federal lands or natural resources. They amount to a tax on the services conveyed by these facilities. Furthermore, under such policies, federal lands and other reservations become roadblocks or toll booths to interstate and international commerce.

*The attachments have been retained in subcommittee files.

AGENCY OFFICIALS HAVE RECOGNIZED THE INEQUITY OF THESE POLICIES

The Interagency Land Acquisition Conference, an ad hoc group of appraisers and real estate professionals in the federal government, recognized the inappropriate nature of these technology-based valuations in their most recent revision to the Uniform Appraisal Standards for Federal Land Acquisition (see Attachment). The Conference indicated that the federal government should not pay inflated technology-based prices when acquiring rights-of-way over lands owned by private citizens or other entities. However, in addressing what a federal agency may charge for the use of an easement on federal land, the participating agencies indicated, quite inconsistently, that they saw no reason why federal agencies could not charge private easement holders these technology-specific rates. Thus, the agencies made clear that, technology-based prices for leasing rights of way are inappropriate when a federal agency has to pay such inflated rates, but may be perfectly appropriate when the federal agencies are the recipient of such fees. In both cases, we are talking about definitions of "fair market value." It is important to note that many of the same appraisers who crafted this inconsistent internal agency policy are the same individuals advising the new fiber-optic fee schedules.

THE PROPOSED METHODOLOGY IS CONTRARY TO REAL ESTATE APPRAISAL PRINCIPLES

Generally speaking, easement values are determined to be somewhat less than the fee value of the land upon which the easement is established, since these rights-of-way consist of a limited contract to use lands for a specific purpose. These valuations are guided by two basic principles: 1) "before and after" value, which ascribes a value to easements equal or similar to the reduction of value or utility resulting from an easement use; and 2) "willing buyer-willing seller," a principle which suggests that the parties to an easement transaction enter as willing and equal participants, with an array of possible options. The approach taken by federal agencies focuses on situations where cities or other entities have incorporated franchise-like fees into required easement payments, or where individual landowners have leveraged their ability to "hold out" or obstruct established rights across adjacent lands to obtain higher payments for easements on their land. These cases are exceptional, and should not alter the established principles, which base easement payments on the underlying property value.

LAND VALUE IS THE PROPER MEASURE OF FAIR MARKET VALUE FOR RIGHTS-OF-WAY

Since there is no true market in federal land, overall valuation, as well as the cost of the land impact, must be estimated. While it is appropriate for the government to come up with some methodology to estimate values, in this case, we believe they have chosen to apply inappropriate principles. An estimation of ROW value must be based on the estimated value of the land, and on the estimated impact of the project on the value of the remaining land, not on the value of technology installed or associated commerce. A cost or impact-based principle is the universal methodology used by right-of-way project developers to determine constitutional levels of payment for rights-of-way obtained from private parties in condemnation proceedings. This is how the Federal Government determines how much to pay private land owners when they acquire rights-of-way for roads or other public projects.

THE MARKET VALUE OF MOST FEDERAL LAND IS LOW

Government-held land is subject to far more restrictions than is similar private property. This is because federal statutes restrict activities on federal lands to accomplish other public objectives. For instance, federal easement holders cannot obtain permanent rights-of-way, and must obtain federal regulatory approval to engage in routine maintenance. Such restrictions increase operating costs, and thus dramatically decrease the value of the federal land easements. Furthermore, development of federal lands is limited, as they are not made available for many of the competing uses possible on private lands, and therefore federal lands are generally of lower real estate value than similar privately-held lands. As a result, any policy that attempts to draw direct associations between right-of-way fees on private lands and fair equivalents on federal lands must take into account factors which reduce the utility and value of federal land easements, and which limit the value of federal lands.

THE AGENCY PROPOSALS ARE INEFFICIENT AND ENVIRONMENTALLY UNSOUND

These new fee schedules, proposed to increase fees incrementally based on the number of users, or are based on the type of technology rather than the land value and use, discourage the construction of dark-fiber or additional unused capacity,

which can be utilized at a later date. Discouraging the installation of fiber that may be currently unused simply means that additional capacity needed in the future may require additional complete installations, with the related economic costs and environmental impacts of reaccessing federal lands and resource areas. Such additional installations would be unnecessary if large numbers of fibers, cables, or ducts, even though underutilized, were installed all at one time, at one fee.

The USFS and BLM, which currently administer ROW through a single, consistent linear fee schedule, have indicated their intention to increase fees for fiber-optic rights-of-way first, and then proceed to reissue fees for other facilities, such as pipelines, power lines, water lines, et cetera. As I noted earlier, and as you will hear from my colleague from the Interstate Natural Gas Association of the Americas, the impacts of such fees on our nations energy infrastructure could be devastating for companies that supply or deliver these services and commodities.

USFS and BLM have initiated a trend among other federal agencies that manage public lands. Through authorizing statutes other than FLPMA, the National Park Service and National Oceanic and Atmospheric Administration have drafted or are considering similar policies charging fees for the right to cross parks and marine sanctuaries with fiber-optic cables. It is important to note that none of these rights-of-way are established until extensive NEPA analyses have been conducted, and deliberate and due care has been taken to prevent and monitor impacts to the environment. Despite the conclusions of government studies, indicating little or no ecological harm, these agencies have followed the lead of the BLM and USFS in pursuing exorbitant increases in right-of-way rents and other compensation for the right to cross federal lands.

CONCLUSION

Rights-of-way for fiber-optic telecommunications and other linear facilities are an important use of federal lands, whose impact on the underlying value, and other uses of those lands is minimal. To paraphrase FLPMA, rent for rights-of-way should be no greater than the value of the rights and privileges authorized by the right-of-way grant or permit, and should reflect a public interest in the construction of such facilities. Furthermore, we believe that valid, established real estate principles should underlie any regulatory decisions made as to the value of rights-of-way. TelROW supports passage of H.R. 762, as well as other regulatory and legislative processes through which a reasonable, practical, and consistent linear right-of-way fee schedule can be developed.

We recognize that these agencies may have, in good faith, misinterpreted the intent of Congress in charging ROW fees, and believe that through the additional guidance provided by H.R. 762, and a public rule making process with adequate opportunity for notice and comment from all stakeholders (the process through which the existing fee schedule was established), the existing fee schedule can be revised, if necessary, to more accurately reflect the value of these rights-of-way. Prompt resolution of this issue will provide certainty to the purveyors of our Nation's critical infrastructure, who are committed to delivering reliable, secure, and vital products, utilities, and services to America's consumers and growing economy. We look forward to working with this Committee, Federal Land Management Agencies, and other interested stakeholders pursuant to what we believe is a common goal, in the public interest.

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